IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-939, Misc.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INC.; and BELL TELEPHONE LABORATORIES, INC., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITIONERS' REPLY TO OPPOSITION OF THE UNITED STATES TO MOTION TO ACCELERATE CONSIDERATION AND TO MOTION FOR LEAVE TO FILE A PETITION FOR WRIT OF CERTIORARI UNDER 28 U.S.C. 1651(a)

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PRELIMINARY STATEMENT

The Government has fundamentally distorted the question which petitioners seek to present to this Court and has simply ignored many of the reasons set forth in the petition for certiorari which justify immediate review of that question by this Court.

The question presented by the petition relates to whether a pervasively regulated *common carrier* enterprise is subject to the antitrust laws with respect to its *common carrier* activities (Petition, p. 4). Yet

the Government in its opposition never acknowledges or in any way attempts to deal with this question. Indeed, the phrase "common carrier" is used only once in the entire opposition, and then only in connection with a description of the provisions of Title II of the Communications Act and without any recognition of the fact that the Complaint in this case involves precisely the activities pervasively regulated by those common carrier provisions (Opposition, p. 7).[1]

This omission is critical. As pointed out in the petition (pp. 53-63), this Court has announced, applied and repeatedly reiterated the principle that activities subject to pervasive common carrier regulation may not be made the subject of antitrust liability. *Pan American World Airways, Inc.* v. *United States,* 371 U.S. 296 (1963); *Hughes Tool Co.* v. *Trans World Airlines, Inc.,* 409 U.S. 363 (1973); *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 373-74 (1973); *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 352 (1963);

[1] In this reference, the Government does suggest that parts of the complaint "involve activity not subject to the FCC's *direct* control" (Opposition, p. 7) (emphasis supplied), apparently referring to those charges discussed at pp. 101-106 of the petition. As is there pointed out, however, the regulatory agencies do have, and have asserted, effective control over matters of this kind. In these circumstances, the assertion of such charges does not confer antitrust jurisdiction. *United States* v. *National Ass'n of Securities Dealers, Inc.,* 422 U.S. 694, 733-34 (1975); *United States Navigation Co.* v. *Cunard Steamship Co.,* 284 U.S. 474 (1932). Certainly, the inclusion of such charges does not justify the broad Complaint involved here; hence, at the very least, the Complaint in this case should have been dismissed without prejudice to the filing of an amended complaint limited to the claims found to be outside the jurisdiction of regulatory agencies. See *Seatrain Lines, Inc.* v. *Pennsylvania R.R. Co.,* 207 F.2d 255 (3d Cir.), *cert. denied,* 345 U.S. 916 (1953).

United States v. *Radio Corp. of America,* 358 U.S. 334, 348-49 (1959). See also *California* v. *FPC,* 369 U.S. 482, 485 (1962). The Government does not discuss these cases, preferring instead to relegate them to its reply on the merits of the petition (Opposition, p. 12), the obviation of a need for which is the whole purpose of the Government's opposition (*id.* at n.10). The Government's apparent strategy is to downplay, to the fullest extent possible, the plain conflict between the decision below and this Court's previous decisions and thus to permit this case to continue indefinitely on this erroneous basis, apparently to take advantage of the possibility that when and if the case comes back for review after trial, the Court would be reluctant to overturn and render useless the efforts of many years of litigation as occurred in the *Hughes* case.

The Government's treatment of the reasons for granting the extraordinary writ sought here is similarly disingenuous. Thus, the opposition categorically asserts that "the only reasons given by petitioner to justify the review sought are the importance of the question presented and the unusual size and potential expense of the trial of this case" (Opposition, p. 5). However, the reasons actually relied upon by petitioners for granting the writ are discussed at length in the petition (pp. 23-106). These reasons include: (1) the fact that this case involves a question of general importance going to the very jurisdiction of the district court, the proper resolution of which would dispose completely of this litigation (Petition, pp. 29-30, 32-33); (2) the fact that the decision below purporting to resolve this question is demonstrably in conflict with the prior decisions of this Court (Petition, pp. 53-71); (3) the fact that the mere pendency of this litigation

would frustrate the policies of Congress reflected in the Communications Act and policies of state legislative bodies reflected in comparable state regulatory statutes (Petition, pp. 27-29); (4) the fact that this litigation would impose both upon parties and upon numerous non-parties that necessarily would become involved, unique burdens beyond any ever encountered in any civil litigation in this country (Petition, pp. 17-21, 26-27); (5) the fact that the discovery and trial in this and some thirty other cases now pending against the Bell System involving the same fundamental jurisdictional question would impose substantial burdens upon the judicial system (Petition, pp. 29-31).

Again, the Government's failure even to acknowledge four of the reasons expressly set forth as a part of the justification for the grant of an extraordinary writ in this case and its bland characterization of the remaining two reasons can only have been designed to achieve some litigating advantage. The decisions of this Court establish that review by certiorari under the All Writs Act is appropriate where, as in the present case, the question presented goes to the jurisdiction of a district court to entertain an antitrust complaint with respect to matters subject to regulation by a federal agency; where, as here, review by appeal is foreclosed by the Expediting Act; and where, as here, a failure to review the decision below prior to final judgment would result in serious hardship from protracted and potentially unnecessary litigation and in frustration of the congressional policy embodied in the regulatory scheme. *United States Alkali Export Association, Inc.* v. *United States*, 325 U.S. 196 (1945); *Far East Conference* v. *United States*, 342 U.S. 570 (1952).

In these circumstances, the Government's opposition can only be regarded as designed to serve its tactical litigating interests essentially without regard to the large public interest considerations that are apparent on the face of the petition. When considered in this light, petitioners submit that the Court should reject the arguments advanced in the Government's opposition and should grant the motion for leave to file the petition for certiorari and the motion to accelerate consideration of the merits of this case.

ARGUMENT

1. Consistent with its contention that the petition sets forth only two reasons for issuance of an extraordinary writ, the principal thrust of the Government's opposition is an effort to show that neither "the cost of trial" nor "the importance of the legal question" will "*alone* ordinarily justify use of an extraordinary writ" (Opposition, p. 5). (Emphasis supplied.) Even that proposition is surely far more doubtful than the Government's opposition would indicate when asserted in the context of a case involving trial costs that are likely to exceed $1 billion.[2] However, whatever the va-

[2] The Government's prediction (Opposition, p. 5, n. 3) that "the amount and expense of the discovery that ultimately will occur" in this case is substantially less than that set out in an affidavit submitted to the district court (Petition, p. 19, n. 19) is encouraging but wholly unsupported by anything in the record in this case or in recent experience in other Government civil antitrust cases (see Petition, p. 21). Extended controversy as to the future course of this proceeding would be inappropriate at this stage. However, petitioners adhere to the view stated in the Petition (p. 20) that even a cursory review of the Government's Complaint and discovery requests indicates that the discovery and trial of this case would be the most massive undertaking in the history of the American judicial system.

lidity of the Government's contention that neither the cost of trial nor the importance of a question, standing *alone*, would justify an extraordinary writ, that proposition is totally inapposite to a petition for certiorari based upon *all* of the reasons set forth above.

This case involves a fundamental jurisdictional question. Whether or not the district court's orders are characterized as a "usurpation of power" (Opposition, p. 5), the proper resolution of this question could dispose of this entire litigation. This fact clearly distinguishes the proposition relied upon by the Government and virtually every case it cites. Neither *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21 (1943); *Kerr* v. *United States District Court for the Northern District of California*, 96 S. Ct. 2119 (1976); nor *Will* v. *United States*, 389 U.S. 90 (1967), involved any question going to the jurisdiction of the district court.[3] Indeed, in denying review under the All Writs Act in those cases, the Court expressly pointed out that the "traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction" (*Roche*, 319 U.S. at 26). Accord, *Kerr*, 96 S. Ct. at 2124; *Will*, 389 U.S. at 95.[4]

[3] In *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379 (1953), also relied upon by the Government (Opposition, p. 6, n. 5), this Court declined to issue a writ of mandamus specifically because "petitioner admits that the court had jurisdiction" (*id.* at 382). The only case cited by the Government in which the jurisdiction of the district court was contested and in which this Court declined to issue a writ is *Ex parte Fahey*, 332 U.S. 258 (1947), a case involving the power of the district court to allow counsel fees. As the Government correctly points out, this Court regarded that issue to be too trivial to support issuance of the writ. However, *Ex parte Fahey* bears no similarity to the present case.

[4] The Government's reliance upon *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964), is even more inappropriate since the Court in *Schlagenhauf* held that a writ of mandamus should issue even where no jurisdictional question was involved in order to formulate the necessary guidelines on a question of law then facing several lower courts. As pointed out in the petition (pp. 29-31), this situation also exists in the present case. Hence, *Schlagenhauf*, far from supporting the position of the Government, actually illustrates yet another reason why the petition in this case should be granted.

The cases relied upon by the Government are therefore entirely consistent with the decisions of this Court in *United States Alkali Export Association, Inc.* v. *United States*, 325 U.S. 196 (1945), and *Far East Conference* v. *United States*, 342 U.S. 570 (1952)—the cases principally relied upon by petitioners. As pointed out in the petition (pp. 25-26), the Court in *United States Alkali* expressly considered the question of the availability of review under the All Writs Act in a government civil antitrust case and concluded that such review was available where denial of review would work a hardship on the parties and possibly frustrate the purpose of Congress in subjecting certain activities to regulatory as opposed to antitrust control. The *Far East* case is even more closely in point, since that case involved an issue for all intents and purposes identical to that presented here, and the Court granted review under the All Writs Act without even discussing the question of its availability.

The Government's efforts to distinguish *United States Alkali* and *Far East* are as curious as they are incorrect. On the one hand, the Government asserts that the cases are distinguishable "since both the FCC and the United States agree that the district court has jurisdiction over substantial parts of the complaint . . ." (Opposition, p. 6). On the other hand, the Government asserts that the cases are distinguishable since

petitioners "concede the Commission has jurisdiction over much of the conduct which is the subject of this complaint" (*id.*). The fact that the FCC took the position that the district court has jurisdiction over a part of the Complaint here surely does not confer jurisdiction upon the district court or in any way limit the appropriateness of review of an erroneous decision by that court under the All Writs Act.[5] And surely the fact that petitioners "concede" that the Commission has jurisdiction over the conduct involved here—a "concession" absolutely necessary to their contention that the conduct involved is within the exclusive jurisdiction of regulatory agencies—cannot impair their right to raise that question in this or any other court.

The Government's contention that there is something special about the district court's orders in this case that renders them inviolate from review under the All Writs Act (Opposition, p. 7) is equally unsound. The orders involved here are identical in all pertinent respects to the order involved in the *Far East* case. In that case, the district court had similarly found that a part of the conduct involved may have been subject to the exclusive jurisdiction of the Shipping Board and that only some of the conduct was subject to the antitrust

[5] As pointed out in the petition (p. 28, n. 28), this Court held in *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659, 686 (1975), that the question of antitrust jurisdiction over matters subject to regulation is a matter to be resolved by the court, not the regulatory agency involved; and the Court has regularly disagreed with regulatory agencies with respect to the proper resolution of such questions. Moreover, in *United States Alkali*, the Court pointed out that the appropriateness of an extraordinary writ to resolve such questions was based upon the need to prevent "frustration of the functions which *Congress has directed* the Commission to perform" (325 U.S. at 204) (emphasis supplied), thus making it plain that it is the purpose of Congress, not the views of the agency, that is controlling.

laws (*United States* v. *Far East Conference*, 94 F. Supp. 900, 902 (D.N.J. 1951)):

> "The mere fact that the shipping industry is subject to governmental regulation does not wholly exempt those engaged in it from the provisions of the Sherman Act. . . .
>
> "We concede that the Conference Agreement, having been approved by the Shipping Board, may be within the purview of the statutory exemption, but it does not follow that all conduct of the defendants and the practices in which they may be concertedly engaged are exempt from the provisions of Section 1 of the Sherman Act."

Despite the nature of the district court's order in *Far East*, this Court reviewed the case under the All Writs Act and reversed the district court's order. Plainly, the same justification for exercise of the Court's power under the All Writs Act exists here; for here, as there, the Court is in a position to terminate this litigation if the jurisdictional question presented is resolved as petitioners contend it should be.

The Government's contention that review of this case is inappropriate until it has had an opportunity to "flesh out the exact dimensions of the dispute" (Opposition, p. 7) is simply an effort to relitigate the issue which it litigated and lost in *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975). In that case, the Government as *amicus curiae* argued to this Court that on the authority of *Thill Securities Corp.* v. *New York Stock Exchange*, 433 F.2d 264 (7th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971), the decision of the jurisdictional question presented there should be deferred until after the case was tried on the merits (Brief for

United States as *Amicus Curiae*, p. 15). In its opinion, however, this Court flatly rejected this approach and expressly declined to follow *Thill* (422 U.S. at 686-87). The *Gordon* approach is unquestionably the proper one to be followed here. The jurisdictional facts relevant to the question before this Court were fully developed in the presentations to the district court and have been fully presented in the petition here. Indeed, the Government essentially conceded that fact in the district court and does not directly challenge it here.

The Government's effort to relitigate this issue merely dramatizes the extent to which it has elevated tactical litigating advantage above public interest considerations in its opposition to the motions here. The petition before this Court sets out in detail the nature of the Complaint in this case and the categories and charges upon which the Government has indicated an intention to rely in an effort to prove that Complaint (pp. 38-40). The Government has nowhere challenged this description of the nature of the case; hence, its assertion of a need to "flesh out the exact dimensions of the dispute" is a transparent effort to inject some coloration into the case that it thinks might be helpful in arguing the fundamental legal issue presented by this petition. Whatever justification there might be for this kind of legal strategy in the ordinary case, it surely is inappropriate to pursue that strategy here in the face of a discovery and trial process of this magnitude.[6]

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[6] The Government's final argument against the appropriateness of review under the All Writs Act—that such review would be contrary to the congressional policy against piecemeal review embodied in the Expediting Act (Opposition, pp. 7-8)—again reflects the unwillingness of the Government to face up to the question

2. The Government contends that this Court should not itself issue the writ sought here even if it concludes that review under the All Writs Act is appropriate, suggesting instead that the Court should await initial review under that Act by the Court of Appeals. In so contending, however, the Government does not question the power of the Court to issue the writ. Quite the contrary, it expressly concedes the existence of such power and cites *Ex parte United States*, 287 U.S. 241, 249 (1932), as establishing the controlling standard for the exercise of that power to be a showing that the question presented is " 'peculiarly appropriate' for action by this Court" (Opposition, p. 9).[7]

Petitioners are in full agreement with the Government's statement of the controlling standard. However, we strongly disagree with its unsupported assertion

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presented here. Petitioners are not seeking piecemeal review. Quite the contrary, they seek a judgment dismissing the Complaint in this case as beyond the jurisdiction of an antitrust court. There is nothing in the Expediting Act or in the policy underlying that Act that is inconsistent with review of that kind of question. Indeed, as pointed out in the petition (pp. 32-33), such review is consistent with and would further the purposes of the Expediting Act.

[7] The relevant portion of this Court's opinion in *Ex parte United States*, stated the appropr.. .e standard as follows (287 U.S. at 248-49):

> "The rule deducible from the later decisions, and which we now affirm, is, that this court has full power in its discretion to issue the writ of mandamus to a federal district court, although the case be one in respect of which direct appellate jurisdiction is vested in the circuit court of appeals—this court having ultimate discretionary jurisdiction by certiorari—but that such power will be exercised only where a question of public importance is involved, or where the question is of such a nature that it is peculiarly appropriate that such action by this court should be taken."

Accord, *Ex parte Peru*, 318 U.S. 578, 584-85 (1943).

that the petition here does not establish that this case is peculiarly appropriate for review by this Court.

The relevant considerations are set out in the petition (pp. 26-33). Petitioners would only add that the Government's description of the delay inherent in intermediate appellate review is probably unrealistically optimistic given the heavy work load of the Court of Appeals for the District of Columbia Circuit. Moreover, whatever delay may be involved—and petitioners fear that it would inevitably be substantial—is in no sense justified if, as petitioners believe, this Court must ultimately resolve the fundamental jurisdictional issue in any event.[8] The Government's suggestion that a delay of a year or more is relatively insignificant reflects an approach that must necessarily result in protracted litigation.

3. The Government's efforts (Opposition, pp. 10-11) to make it appear that this Court will exercise its power to grant certiorari before judgment under 28 U.S.C. § 1254(1) only with respect to "(i) issues similar to those already pending before the Court . . . (ii) relations with foreign powers . . . (iii) extreme national

[8] In this connection, petitioners feel compelled to point out the Government's misreliance here upon *Aaron* v. *Cooper*, 357 U.S. 566, 567 (1958) (Opposition, p. 10)—a case in which it is true that this Court denied immediate review in favor of intermediate appellate review in the Court of Appeals. Within two months after that action, the Court felt compelled itself to hear argument in this case at a Special Term of Court, even though it did so only for the purpose of affirming the Court of Appeals. *Cooper* v. *Aaron*, 358 U.S. 1 (1958). Although petitioners do not mean to suggest by recounting this history that the same kind of need would arise here, it does seem plain that the Government's reliance upon *Aaron v. Cooper* is misplaced to the extent that it treats that case as vindicating the ordinary appellate processes.

emergency . . . and (iv) the potential for a constitutional crisis . . ." requires no lengthy reply. The fact is that this simply is not so, as demonstrated by the petition (p. 3). *Railroad Retirement Board* v. *Alton R. R. Co.*, 295 U.S. 330 (1935), hardly fits into any of these categories. Yet the Court issued certiorari before judgment in that case, on the ground that (295 U.S. at 344):

> "Before hearing in [the court of appeals] the petitioners applied for a writ of certiorari, representing that no serious or difficult questions of fact were involved, and urging the importance of an early and final decision of the controversy."[9]

This is precisely the situation presented by the petition in this case, since this case also involves a legal issue with no serious questions of fact involved and an early decision of this controversy by this Court is even more important here than in *Alton*. For here such a decision would terminate, or at least clarify, the problems of this case, but also could resolve or clarify the problems of thirty other cases pending in six circuits outside the District of Columbia.

4. The Government's only stated objection to petitioners' motion to accelerate consideration is that it "would, if granted, effectively amount to granting certiorari " (Opposition, p. 11). Thus, the Government

[9] The Government's suggestion (Opposition, pp. 11-12, n. 9) that the petition for certiorari under 28 U.S.C. § 1254(1) can be dismissed on the theory that the case is not "in" the Court of Appeals is unsound and inconsistent with the Government's own previous recognition (Opposition, p. 10) that if the Court of Appeals "summarily denies the petition, petitioners may seek certiorari before this Court without delay." If a summary denial can be reviewed on the theory that the case is in the Court of Appeals, it can only be because the filing of the petition put it there.

makes no objection to the procedures proposed in the event the Court does decide to hear the case. Petitioners submit that the Court should hear the case and that, in light of the Government's acquiescence, it should do so on the schedule and under the procedures suggested in the motion.

CONCLUSION

Petitioners have throughout the proceedings in this case sought to subordinate considerations of temporary partisan advantage to the overriding need to obtain a just resolution of the critical issues involved as soon as possible. When the district court initially raised the threshold jurisdictional issue, petitioners expressed a willingness to brief that issue on any schedule acceptable to the Government. Subsequently, when requested by the district court, petitioners filed four lengthy briefs in periods ranging from ten to thirty days. Later, when the district court indicated on November 16, 1976, that it would lift its stay of discovery upon the resolution of certain discovery disputes at a hearing to be held on January 17, 1977, petitioners promptly negotiated a tentative settlement of these disputes with the Government on December 15, 1976, which provided for immediate resumption of discovery.

Against this background, and in light of the fact that the procedure urged by petitioners here reflects a further effort on their part to resolve the basic question overhanging this litigation as promptly as possible, it is unfortunate and distressing that the Government does not see fit to support this procedure which clearly will enhance the administration of justice and remove unnecessary burdens upon the judicial system.

Petitioners respectfully submit that these much desired goals would be served by the granting of their motions for leave to file the petition for certiorari and for accelerated consideration of this case.

Respectfully submitted,

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